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No. 91-426

In The

Supreme Court of the United States

October Term, 1991

HARRY WELTMAN,

Petitioner,

v.

OZZIE SILNA; DANIEL SILNA; DONALD SCHUPAK; SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P.; AND PAK FABRICS, INC., d/b/a PAK FABRIC SALE CO.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the Eighth Circuit, reported at 936 F.2d 358 (June 11, 1991)

STATEMENT OF FACTS

Petitioner filed an action in Missouri circuit court against Respondents, the Spirits of St. Louis Limited

Partnership and its general[1] and limited partners, claiming a limited partnership interest and seeking an accounting and a distributive share of the partnership assets. Respondents removed the action to the United States District Court for the Eastern District of Missouri based on diversity of citizenship. Petitioner moved to remand for lack of diversity, arguing that because he claimed to be a limited partner his citizenship should be attributed to both the defendant partnership and the plaintiff, thereby defeating complete diversity.

The district court disagreed, holding that the court must look "beyond the pleadings and arrange[] the parties according to their sides in the dispute." (*Appendix*[2] at p. 34). Applying this established doctrine, the district court held that Petitioner's interest, and therefore citizenship, was aligned solely as plaintiff, and not with the entity he was suing. The district court therefore found it unnecessary even to reach the issue presented in *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S.Ct. 1015 (1990)

The court thereafter bifurcated discovery and the trial, with the initial proceedings focused on the issue of whether Petitioner was a limited partner. (*Respondents' Supp. App.* at p.6). At the one-day trial on the preliminary issue of partnership status, the court rendered a judgment for Respondents, finding that Petitioner was not a limited partner.

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[1] The general partner, Pak Fabrics, Inc., is an inactive New Jersey corporation with no parent or subsidiary companies.

[2] Except where otherwise indicated, all references to appendices refer to Petitioner's appendix [hereinafter "App."] attached to the Petition.

On appeal, the Eight Circuit agreed with the district court's ultimate jurisdictional finding. The Eighth Circuit held, as in *Carden*, that a limited partnership's citizenship is that of all its limited partners and general partners. (*App.* at p.110). The Eighth Circuit, however, declined "to treat [Petitioner] as both a plaintiff and a defendant for purposes of determining diversity." (*Id.*). The court found that Petitioner was not suing himself, but rather was suing the wholly diverse general and limited partners named as defendants. The Eighth circuit thus affirmed the district court's jurisdictional finding, but remanded for application of a different legal standard on the partnership issue. On remand, the district court again determined that petitioner was not a limited partner. (*App.* at 117). Petitioner appealed the merits but not the jurisdictional issue, and the Eighth Circuit again affirmed. (*App.* at 133). Petitioner now seeks review of the jurisdictional issue.

THE PETITION SHOULD BE DENIED

I. PETITIONER RAISES NO LEGAL OR FACTUAL ISSUE WARRANTING REVIEW BY THIS COURT

Petitioner seeks review of the question:

> Whether a District Court may properly hear and decide a case in which the plaintiff claims to be a limited partner of a limited partnership, and one of the defendants is the limited partnership, when the sole basis for federal jurisdiction is diversity of citizenship.

Given the unique factual circumstances of this case and the lack of any conflicting law as to the decisions of the courts below, the Question Presented does not raise an issue warranting review by this Court. Petitioner attempts to create a conflict with an existing Supreme Court decision by arguing that the first Eighth Circuit decision below is in conflict with *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S.Ct. 1015 (1990). (*Petition* at 7). Petitioner's sole argument is that *Carden*, a case decided after the Eighth Circuit's first decision in this case, establishes a rule of law inconsistent with that applied by the Eighth Circuit. But the Eighth Circuit applied the same rule of law as later adopted in *Carden*. There is simply no conflict, and Petitioner therefore has no basis for seeking this Court's review.

Carden involved an action brought by an Arizona limited partnership against two Louisiana citizens. The question presented to the Court was "whether, in a suit brought by a limited partnership, the citizenship of the limited partners must be taken into account to determine diversity of citizenship among the parties." 110 S.Ct. at 1016. The Court answered the question in the affirmative, holding that "we reject the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members." *Id.* at 1021. Although addressing a vastly different factual setting, the Eighth Circuit in this case applied exactly the same rule, stating that "[i]n determining diversity of citizenship, the citizenship of each limited partner must be considered." *Weltman v. Silna*, 879 F.2d 425, 427 (8th Cir. 1989) (*citing Stouffer Corp. v. Breckenridge*, 859 F.2d 75, 76 (8th Cir.

1988)). Having properly applied the law subsequently set forth by this Court in *Carden*, the Eighth Circuit went on to apply an independent principle to find diversity, namely, realignment of the parties, a principle that was neither raised nor applicable to the circumstances in *Carden*. Thus, Petitioner fails to establish that the Eighth Circuit's holding conflicts with this Court's decision in *Carden*.

The real issue raised by Petitioner, therefore, is only whether after *Carden* a court is still permitted to do what the district court below did, namely, to look "beyond the pleadings and arrange[] the parties according to their sides in the dispute." Given the factual circumstances presented here, this question raises none of the considerations warranting review by writ of certiorari. *See* Sup. Ct. R. 10. First, Petitioner cites no authority repudiating the long-established duty of a court, in determining diversity, to align the parties according to their "sides in the dispute." As more fully discussed below, undisputed precedent supports the application of this realignment duty to suits between a partner and his or her partnership. Second, diversity jurisdiction existed independently of the reasons relied upon by the courts below, in part because the district court twice found that Petitioner was in fact not a limited partner. Accordingly, the petition raises a question that is both moot and not in conflict with any cited decision of this or any other federal court. For these reasons the petition for writ of certiorari should be denied.

II. NO JURISDICTIONAL QUESTION IS PRESENTED BECAUSE THE ULTIMATE FINDING OF FACT MOOTS THE APPLICATION OF *CARDEN* TO THIS CASE

As outlined above, the only issue raised in this case is whether a court after *Carden* may realign parties in accordance with "their sides in the dispute." Yet, even this issue is not properly before this Court, for the district court twice found that Petitioner was not a limited partner in the defendant partnership. Accordingly, complete diversity did in fact exist, regardless of any claim of error regarding the district court's use of realignment. The issue raised by Petitioner is thus moot.

A. The District Court Had Jurisdiction To Determine Whether Petitioner Was a Limited Partner

Petitioner, however, argues that the district court was bound to determine jurisdiction strictly by the allegations in the complaint and could neither realign the parties nor have its jurisdictional determination justified by the ultimate factual finding that Petitioner was not a partner. Petitioner misses the point – a "well-pleaded" complaint does not deprive a court of jurisdiction to decide the factual validity of the jurisdictional allegations in the complaint. *See Land v. Dollar*, 330 U.S. 731, 735, 738-39 (1947) (holding that the "District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits," even though there would have been no question concerning jurisdiction "if the allegations of the petition [had been] true."). A federal court always

has jurisdiction to determine its own jurisdiction. *See Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938).

Where removal jurisdiction is contingent upon a jurisdictional fact in dispute, federal courts must look beyond the plaintiff's complaint to determine their jurisdiction. *See, e.g., Zimmerman Metals, Inc. v. United Eng. & Constructors*, 720 F.Supp. 859, 861 (D. Colo. 1989) (relying on affidavits to reject factual allegation of corporate citizenship in plaintiff's state-court complaint). Unlike jurisdiction founded on the existence of a federal question, the factual nature of diversity jurisdiction often requires federal courts to look beyond a plaintiff's state-court pleading to determine whether complete diversity existed for removal jurisdiction, such as when a plaintiff has joined a nominal party, *Salem Trust Co. v. Manufacturers' Fin. Co.*, 264 U.S. 182 (1924), or joined a nondiverse improper party through artful pleading, *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921), or has aligned the parties in the complaint contrary to their true interests, *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69 (1941).

A plaintiff's allegations concerning citizenship are not dispositive as to whether diversity jurisdiction actually exists when the removing party disputes the basic jurisdictional facts. A plaintiff cannot avoid diversity jurisdiction by omitting or inaccurately pleading "jurisdictional facts" such as the citizenship of the parties. *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 551 n.14 (5th Cir. 1981); *Green v. Amerada Hess Corp.*, 707 F.2d 201, 204 n.2 (5th Cir. 1983) (evidentiary hearing appropriate if pleadings contain misrepresentations of "jurisdictional fact"), *cert. denied*, 464 U.S. 1039 (1984); *Keller v. Carr*, 534 F.Supp.

100 (W.D. Ark. 1981) (omission of citizenship of parties in state court complaint does not bar removal on diversity grounds); *see M-K Engineering Co. v. Alaska Power Authority*, 662 F.Supp. 303, 303 n.1 & 304 (D.Alaska 1986) ("No presumptive truthfulness attaches to [plaintiff's] allegations" concerning merits of jurisdictional claims).

The decision of *Zimmerman Metals, Inc. v. United Eng. & Constructors*, 720 F.Supp. 859, 861 (D. Colo. 1989) illustrates a district court's appropriate examination of matters beyond the pleadings to determine diversity in a removal case. In *Zimmerman Metals*, after its review of affidavits, the court found that removal jurisdiction existed despite plaintiff's allegations of citizenship set forth in its state-court complaint. Petitioner's assertion that the district court was obligated to accept a plaintiff's allegations concerning the citizenship of the defendant partnership is thus simply not the law.

In the present case, the district court was obligated, on the motion to remand, to determine whether complete diversity existed. The identity of each of the partners was the only jurisdictional fact in controversy.[3] Although the

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[3] Not only did Respondents dispute the jurisdictional fact concerning the citizenship of the partnership, Petitioner's artful pleading misrepresented the jurisdictional facts establishing the basis for removal. Petitioner's state-court petition alleged that he was entitled to a share of certain settlement proceeds pursuant to the terms of limited partnership agreement. (*App.* at p. 5). The state-court petition intentionally omitted the critical fact that the "limited partnership agreement," upon which the suit was based, was not the current or most recent version of that agreement. In reality, the amended

(Continued on following page)

court avoided the necessity of resolving that issue by realigning the parties, the court ultimately did decide the jurisdictional facts in Respondents' favor at the trial on the merits.

Nevertheless, the district court could have postponed decision on the disputed jurisdiction issue until a factual determination was made during the one-day trial. Ordinarily, a jurisdictional challenge will be addressed by affidavit or evidentiary hearing prior to trial. *Osborn v. United States*, 918 F.2d 72[illegible] (8th Cir. 1990); *see, e.g., Zimmerman Metals v. United Eng. & Constructors*, 720 F.Supp. at 861 (affidavit). However, when the jurisdictional issue is inextricably intertwined with the merit, a full trial on the merits may be necessary to resolve the issue. *Osborn*, 918 F.2d at 730; *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986). In such cases, the jurisdictional question will be postponed until a determination of the merits is accomplished by summary judgment or trial. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *see also Zunamon v. Brown*, 418 F.2d 883, 886 (8th Cir. 1969) ("case should be heard and determined on its merits through

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limited partnership agreement in effect at the time of the petition did not identify Petitioner as a limited partner or otherwise entitled to proceeds. Petitioner knew of this crucial *amended* limited partnership agreement: in fact, he signed it as president of the corporate general partner and it was a public record on file with the State of Delaware. Petitioner chose not to acknowledge the existence of this public record that he had signed showing he was not a limited partner. He thus mischaracterized and "artfully pleaded" the jurisdictional fact upon which he now attempts to rely.

regular trial procedure" when jurisdictional issue cannot be decided without ruling on the merits); C. Wright & A. Miller, *Federal Practice and Procedure* §1350 (1990).

Absent realignment, such a procedure would have been appropriate here because the ultimate issue on the merits was inextricably intertwined with the jurisdictional factual dispute concerning the identity and citizenship of the partners. *See Weltman v. Silna*, 879 F.2d 425, 427 (8th Cir. 1989) ("The ultimate issue in the case is whether Weltman, who is not listed as a limited partner on the amended agreement, is in fact a limited partner."). The district court therefore had jurisdiction to hold a hearing to determine the jurisdictional and substantive issue in the case. The trial on the partnership issue was essentially just such a hearing, which resulted in a judgment for Respondents and a finding that Petitioner was not entitled to a partnership interest. (*App.* at p. 94). Because Weltman was thereby adjudged not to be a partner at the time the suit was commenced, complete diversity existed and could have been so determined at the completion of the trial.

B. The Determination That Petitioner Was Not a Limited Partner Moots Any Substantial Issue of Constitutional or Statutory Interpretation

Petitioner's challenge to diversity jurisdiction, based on the application of *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S.Ct. 1015 (1990), to his status as a limited partner of the Respondent partnership, is mooted by the district court's finding that Weltman was in fact not a

limited partner. Under the present circumstances, the district court had jurisdiction to decide the jurisdictional issue upon a trial of the merits. Having had a trial on the merits and determining that Petitioner was not a limited partner, the issues raised in the petition are moot. Any alleged error in use of realignment or otherwise in sustaining the removal was procedurally harmless given the actual existence of original diversity jurisdiction. *See McKay v. Uinita Development Co.*, 229 U.S. 173, 177 (1913) (improper removal does not deprive the court of power to decide case if diversity jurisdiction ultimately found to exist); *Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir. 1983) (error in holding a full evidentiary hearing on motion to remand to decide existence of fraudulent joinder for diversity purposes was reviewable by harmless error standard).

III. THE REALIGNMENT OF THE PARTIES BY THE COURTS BELOW TO DETERMINE DIVERSITY DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *CARDEN* AND IS CONSISTENT WITH THE LONGSTANDING OBLIGATION OF FEDERAL COURTS.

Even if the jurisdictional issue raised by the petition was not moot as was of "special and important" concern to this Court, *see* Sup. Ct. R. 10, the decisions by the courts below are consistent with established precedent of this Court and lower federal courts.

In determining whether diversity jurisdiction exists, courts are not bound by the formal alignment of the parties in the pleadings but must "look beyond the pleadings and arrange the parties according to their sides in

the dispute." *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69 (1941). Moreover, only "real and substantial" parties are considered in determining diversity, and nominal or formal parties must be disregarded. *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 460-61 (1980); *Salem Trust Co. v. Manufacturers' Fin. Co.*, 264 U.S. 182 (1924).

Where a partnership is a real party to an action, the Court's decision in *Carden* establishes that diversity is determined by looking at the citizenship of all of the partners, limited and general. Yet, while *Carden* conclusively rejected any argument that a limited partner is not a "real" party in a suit involving the partnership, this rule in no way diminishes a court's obligation to determine *upon which side of the litigation* each of those partners should be aligned – or upon which side the partnership itself should be aligned. Thus, *Carden* only establishes that each of the limited partners must be counted; it does not determine upon which side the partner or partnership will be counted.

Ordinarily, of course, the real interest of each partner will align with the side of the partnership where the partnership is being opposed by a third party. Where the suit is between a partnership and a partner, however, the real interests of the parties are not facially apparent.

Nothing in the analysis of *Carden* suggests that courts do not remain obligated to look beyond the pleadings to determine the proper alignment of the parties. The district court and court of appeals below both determined that Petitioner, if a partner in the defendant partnership, was nevertheless aligned properly as plaintiff and had no real interest as part of the defendant partnership. The

conclusion was obvious: as the Eighth Circuit noted below, the court would not treat the same person as both plaintiff and defendant for diversity purposes. To hold otherwise would violate the maxim that a person cannot sue himself, for such a suit would not present an actionable "case and controversy" between adverse parties. The courts below therefore properly aligned Petitioner's putative status as part of the defendant partnership with his true interest as plaintiff.

Realignment frequently applies in suits between entities and its owners, such as shareholder suits against the corporation and its officers, *Duffey v. Wheeler*, 820 F.2d 1161 (11th Cir. 1987), and in suits between partners and the partnership. *Bundag, A.G. v. Euramerica Corporation*, 510 F.Supp. 622 (N.D. Tex. 1981); *Gore v. Stenson*, 616 F.Supp. 895 (S.D. Tex. 1984). *In Bundag*, a limited partnership filed suit in state court against its general partner and others. The suit alleged that the limited partners were the real parties plaintiff. Thereafter, the plaintiff dismissed the partnership as plaintiff, leaving only the limited partners, and defendants removed the case. In holding that diversity jurisdiction already existed prior to the dismissal of the partnership, the district court stated:

> Although the plaintiff was formally designated as the partnership itself when the case was filed, this court must look beyond this designation and make a practical determination based on the nature of the dispute. The real dispute in this case is between the limited partners and the general partner. The partnership itself has no stake in the outcome of the lawsuit. . . . [the partnership] is a nominal party only . . . [t]he limited partners and the general partner have

> opposite interests in the outcome of the litigation. Therefore, [the partnership] should be treated as a party defendant for jurisdictional purposes.

510 F. Supp. at 624. The court then realigned the parties and determined that diversity was present.

Here, the partnership had absolutely no interest in the outcome of the lawsuit. The Eighth Circuit found that the fundamental issue in the action was whether Petitioner held a partnership interest in the partnership. The net worth of the partnership would remain unchanged by any outcome because the relief sought would merely redistribute existing wealth within the partnership. The real adversaries to plaintiff's action were the partners who would suffer a reduction in their partnership interests if the action by Petitioner was successful. *See Bundag, A.G. v. Euramerica Corporation*, 510 F.Supp. at 624. Accordingly, Petitioner was properly aligned only as plaintiff. Realignment was proper, whether Petitioner is realigned in his capacity as partner, as decided by the courts below, or the nominal partnership is realigned or ignored as not a "real" party to the dispute. *See Wolff v. Wolff*, 768 F.2d 641, 648 (5th Cir. 1985) (finding diversity of citizenship in suit by partner against co-partner and nominally-named partnership).

Petitioner cites several recent cases for the proposition that *Carden* effectively eliminates the possibility of diversity jurisdiction where a limited partner sues his partnership. (*See Petition* at 7). These cases clearly do not stand for this broad proposition, as nothing in these cases affects the longstanding rule that diversity jurisdiction, even after *Carden*, requires a consideration of the proper

alignment of the parties. In fact, one of the decisions cited by Petitioner implicitly acknowledges the *post-Carden* possibility of realignment. *Schibuk v. Poinciana-Regency Ltd. Partnership*, 764 F. Supp. 878, 885 (S.D.N.Y. 1991) (describing citizenship of parties "absent realignment of the defendant partnership as a party-plaintiff," *quoting Shlomchik v. Richmond 103 Equities Co.*, 763 F.Supp. 732 (S.D.N.Y. 1991)). Thus, the courts below properly honored their duty to look at the proper alignment of the parties in determining that Petitioner's citizenship was properly attributed only to plaintiff.

IV. OTHER REASONS SUPPORTING JURISDICTION THAT MAKE REVIEW OF THIS CASE INAPPROPRIATE

As noted in the precedent cited by Petitioner, "a circuit court may look to unpleaded bases of federal subject matter jurisdiction." *Curley v. Brignoli, Curley & Roberts Assoc.*, 915 F.2d 81, 85 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1430 (1991). Thus, the Question Presented by Petitioner is particularly inappropriate for review if, upon remand, an independent basis for upholding jurisdiction would exist. Even if the jurisdiction issue was not moot and the Court rejected the lower courts' application of realignment, other independent bases for diversity exist that make granting Petitioner's writ improvident.

If the partnership is found to be a dispensable party, it could be ignored or dismissed, thereby maintaining complete diversity among the parties. *See, e.g., Curley*, 915 F.2d at 88-89 (dismissing partnership as dispensable party in suit between limited partners and general partner).

Similarly, the partnership may be deemed a "nominal" party for diversity purposes. *Salem Trust Co. v. Manufacturers' Fin. Co.*, 264 U.S. 182 (1924). Given the lower courts' characterization of the nature of this action, the partnership would likely be considered dispensable or nominal. A grant of Petitioner's writ of certiorari is therefore inappropriate because it seeks review of an issue that will likely have no effect on the outcome of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HARRY WELTMAN, Plaintiff, vs. OZZIE SILNA, DANIEL SILNA, DONALD SCHUPAK, SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P., and PAK FABRICS, INC., d/b/a PAK FABRIC SALE CO., Defendants.	)	No. 87-91C (A)

MEMORANDUM AND ORDER

This matter is before the Court on defendants' separate motions to compel discovery and for a protective order.

The action is before this Court after removal from the Circuit Court of the City of St. Louis. For a discussion of jurisdiction, see Memorandum and Order of this Court dated July 15, 1987, which denied plaintiff's motion to remand.

I

On April 10, 1987, defendants requested that the plaintiff produce certain documents. On May 8, 1987, plaintiff responded to the request, agreeing to produce most of the documents requested. He objected to Requests Nos. 8, 9 and 24, which he claimed were irrelevant. These requests are for plaintiff's income tax returns,

financial statements, and loan and credit applications. Plaintiff also objected to No. 17 to the extent that it sought personal tax returns. Next, plaintiff objected to Requests Nos. 18 through 23 on the grounds of vagueness, et cetera. These requests are for "all documents reflecting, referring to, or relating to" the various defendants. Plaintiff objected to No. 26 on the grounds that the request fails to describe the documents requested with reasonable particularity. This request pertained to documents reflecting plaintiff's damages. Finally, plaintiff objected to Nos. 27 and 29 on the grounds of work product. These were requests for documents concerning studies prepared relating to the limited partnership and for all documents reviewed or relied upon in preparing the response to the request.

Since then, plaintiff has not supplied any of the documents, including the ones to which he had no objection. Defendants, in an affidavit of compliance with Local Rule 7(C), aver that they have offered to work with plaintiff to narrow or modify the discovery requests, but that plaintiff's counsel has been unwilling to assist. Defendants on July 10, 1987, then filed this motion to compel discovery.

Plaintiff, on July 7, 1987, propounded his own set of interrogatories. Defendants have objected to these on numerous grounds, the most significant being that plaintiff has requested detailed financial information about the partnership. This, they argued, is tantamount to an accounting which means that plaintiff is attempting to secure one of his prayers for relief via discovery.

II

Plaintiff has offered no reason for his delay in sending the unobjected-to requests for production. Such refusals only serve to prolong litigation and are not tolerated.

Regarding Requests Nos. 8, 9 and 24, which involve plaintiff's financial documents, these items are not irrelevant as plaintiff claims they are. This is because the gains and losses from the plaintiff's share of the limited partnership would be reported on his income tax returns and that his interest would be reported as an asset on any financial statement. The converse of this is that if there are no references to the partnership on any of these documents, it would be reasonable to conclude that Weltman did not believe that he had any ownership interest. The matters in Requests Nos. 8, 9 and 24 will be produced.

To the extent that No. 17 refers to income tax returns, the above analysis is relevant. Defendants also assert that the information contained in Request No. 17 is relevant to the request for an accounting. No. 17 will be produced.

Nos. 18 through 23 are broad requests. As defendants note, if these documents are too numerous to be reasonable [sic] produced, the defendants are willing to discuss how to narrow or modify the request. No. 26 is similar in that the objection that the requests are not described with reasonable particularity is susceptible to discussions between the parties to refine the request. If, after such discussions, the parties are unable to come to a mutual understanding, the Court can address this matter in conference.

Nos. 27 and 29 are objected to on the grounds of work product. This Court notes that general objections based on the work product exception are insufficient. As with the objections above, the better method of resolution is by the attorneys themselves.

Regarding the second motion, plaintiff, despite his unwillingness to provide even the agreed-upon discovery, submitted interrogatories to the defendants. Defendants have objected and move for a protective order. They provide three arguments in support of their request.

First, they cited the pendency of the motion for summary judgment. Considering this Court's action on that motion, this reason is no longer applicable.

Secondly, defendants state that plaintiff should fulfill his discovery obligations before defendants answer the interrogatories. As this order compels plaintiff to cooperate in discovery, the discussions between the attorneys over defendants' discovery requests can be used to arrange compliance with plaintiff's requests, to include timing.

Defendants, in their final point, argue that certain interrogatories seek a complete accounting of revenues, proceeds and distributions of the partnership, or, as defendants put it, "an accounting through the guise of discovery." Defendants argue that before they be required to provide confidential financial information, plaintiff must prevail on his claim. That way, if plaintiff fails, defendants' confidential information, which is relevant only on the issue of damages, will have been protected. And, as this is a bench-tried case, this protective order will not present a major logistical burden. Plaintiff did

not file a memorandum in opposition to the request for the protective order and, therefore, presents no argument disputing this.

In specific, defendants object to Nos. 4, 7, 10, 11, 12, 13 and 16 of the interrogatories to Donald Schupak, to Ozzie Silna and to Daniel Silna; Nos. 3, 6, 8, 9, 10, 11 and 14 of the interrogatories to the Spirits of St. Louis Basketball Club Limited Partnership (Spirits); and to Nos. 3, 4, 7, 10, 11, 12, 13 and 16 of the interrogatories to Pak Fabrics, Inc. (Pak).

A review of these interrogatories reveals that, despite defendants' objections, not all of them can be classified as questions aimed at a de facto accounting. For instance, one interrogatory requests information on the salary paid by defendants to plaintiff. This is similar to the request for Production No. 17 propounded by the defendants to the plaintiff. Other interrogatories request responses as to the amount of the investment by the individual defendants and other persons, as well as information concerning a bankruptcy proceeding. While much of this is confidential, if defendants desire, suitable means of preserving the confidentiality can be developed. But these interrogatories do not seek an accounting disguised as discovery.

However, certain interrogatories clearly seek detailed and voluminous information as to ticket sales, expenses, television revenues and the like. They are:

Interrogatories to Ozzie Silna:	Nos. 11, 12 and 13.
Interrogatories to Daniel Silna:	Nos. 11, 12 and 13.
Interrogatories to Donald Schupak:	Nos. 11, 12 and 13.
Interrogatories to Spirits:	Nos. 9, 10 and 11.
Interrogatories to Pak:	Nos. 11, 12 and 13.

It is not necessary at this time that discovery take place on these matters. If plaintiff proves his claim, these items can be disdovered [sic].

Accordingly, defendants' motion to compel discovery is sustained in part and denied in part, and defendants' motion for protective order is sustained in part and denied in part.

/s/ Roy W. Harper
U. S. District Judge

September 21, 1987.